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# The Changing Landscape of Employment Law: Arbitration, PAGA, and Appeals

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# Introduction

## Kyle W. Nageotte, Esq.

- Represent employers in a broad range of employment law matters, including claims involving class actions, discrimination, wage and hour disputes, wrongful termination, trade secrets, and the California Private Attorneys General Act (PAGA).

# Introduction

## Rachel M. Garrard, Esq.

- Represent individuals and entities in appellate proceedings, including civil writs and appeals in California federal and state courts of appeal; assist trial counsel with key motions, trial preparation, and preserving appellate issues before, during, and after trial.

# Introduction

## Higgs Fletcher & Mack LLP

- San Diego's oldest law firm
- Full service
- 14 attorneys in the employment law group;  
highly specialized appellate department



# Questions?

- If you have questions during today's presentation, please ask!
- Use the chat / Q&A feature.

# The Changing Landscape of Employment Law

## What is PAGA?

- The Private Attorneys General Act of 2004 (PAGA) authorizes allegedly aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations
- The State of California is the “real party in interest”

# The Changing Landscape of Employment Law

## How Did We Get Here?

- Legislative Intent
  - Initially, not a mass tort action
- Civil Penalties
  - 25% of penalties go to aggrieved employees
  - 75% of penalties go to the State of California Labor and Workforce Development Agency (LWDA)
- Attorney's Fees
  - Typically, significant

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## PAGA Claims Include

- Failure to provide meal / rest breaks claims
- Off-the-clock claims
- Overtime claims
- Wage statement violation claims
- Final pay claims
- Reimbursement claims



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## Is PAGA a Class Action?

- Not a class action
- Procedurally different than a class action
  - No class certification requirements
    - Manageable? (*Estrada v. Royal Carpet Mills*)
  - Significant due process issues
- Proving a PAGA claim
  - Must prove a Labor Code violation for each pay period per employee
- Discovery in PAGA actions
  - Almost unlimited discovery from the start of litigation
  - Typically, significant discovery on allegedly aggrieved employees
  - In a class action, discovery is limited before certification

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## What About PAGA Penalties?

- Set by the court (not a jury)
  - Up to \$100 per pay period / per employee for “initial violation”
  - Up to \$200 per pay period / per employee for “subsequent violations”
- Court has discretion
  - A court could award a very small penalty (even nothing)
  - No penalties where it would be “unjust, arbitrary, and oppressive or confiscatory”
- Courts’ discretion helpful in mediations / settlement

# The Changing Landscape of Employment Law

## The Rise of Arbitration

- Contractual arbitration
  - Defined
  - California law and the Federal Arbitration Act (FAA)
  - Pre-employment / during employment

# The Changing Landscape of Employment Law

## Benefits of Arbitration

- Faster results
- Greater privacy
- No “runaway jury”
- No court trial / jury
- Streamlined discovery (with certain exceptions in employment cases)
- Settlement demands are more reasonable

# The Changing Landscape of Employment Law

## Pitfalls of Arbitration

- Limited discovery
- Difficulty securing summary judgment / adjudication
- Employer must pay for the arbitrator
- Difficult to join other parties
- Limited grounds for appealing and arbitrator's decision



# The Changing Landscape of Employment Law

## California vs. the FAA

- California courts and the state Legislature generally disfavor arbitration
- The FAA strongly favors arbitration
  - *Discover Bank*
  - *Concepcion*
  - *Iskanian* (PAGA outlier?)

# The Changing Landscape of Employment Law

## AB 51

- Gov. Brown vetoes 2 bills limiting arbitration; Gov. Newsom signs AB51 (2019)
- AB 51 made mandatory arbitration agreements unlawful
- AB 51 made *criminal* and *civil* penalties available against employers who compelled their employees to sign arbitration agreements
- Injunction granted by the 9th Circuit
- AB 51 conflicts with the FAA
  - Supremacy Clause
  - Supreme Court precedent
    - Statutes that exact some “hostility to arbitration” are pre-empted by the FAA (*Kindred Nursing*)

# The Changing Landscape of Employment Law

## *Chamber of Commerce v. Bonta (Bonta)*

- Lifted injunction against AB 51
- Holds that AB 51's prohibition on *compelled* arbitration agreements does not conflict with the FAA and is therefore enforceable
- However, held the FAA preempts AB 51 criminal and civil penalties
- Further held arbitration agreements, once signed, are enforceable

# The Changing Landscape of Employment Law

## *Viking River Cruises*

- Should arbitration agreements apply to PAGA claims?
- U.S. Supreme Court
- Appears to follow *Concepcion*—will the Court overturn *Iskanian*?
- What does this mean for PAGA?
  - Potentially significant ramifications
  - Arbitration agreements with representative waivers will likely make private PAGA claims entirely obsolete

# The Changing Landscape of Employment Law

## What's Next?

- If *Iskanian* falls . . .
- Arbitration agreements should be updated
  - Ensure the agreement contains all necessary pro-employee provisions
  - Sexual harassment / assault claims
  - Etc.



# The Changing Landscape of Employment Law

## Why?

- Arbitration agreements will still be challenged
  - Contract rules apply
  - Scope, waiver, undue influence, unconscionability, etc.
- Update procedures for employee signatures / consent to agreements
- Appeals from arbitration decisions will still be largely immune from judicial review
  - Legal error is not enough

# Questions?

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Thank you!

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